Case No: QB/2012/0016

Neutral Citation Number: [2012] EWHC 3669 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2012

Before:

MR JUSTICE CRANSTON

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Between:

(1) Mr Barry Clark	**Appellants**
(2) Mrs Julie Clark	
- and -	
In Focus Asset Management & Tax Solutions Ltd	**Respondent**

- -
- -

Clive Wolman (instructed by **George Ide LLP**) for the **Appellants**
Simon Howarth (instructed by **CMS Cameron McKenna LLP**) for the **Respondent**

Hearing dates: 17 October 2012

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Judgment

Mr Justice Cranston:

Introduction

1. In broad terms the question raised in this appeal is whether it is open to parties, having accepted a favourable determination of the Financial Services Ombudsman ("the Ombudsman"), later to claim in court for damages to cover what they allege is their full loss. The appellants in this case, Mr and Mrs Clark, sue for damages following their acceptance of the Ombudsman's determination that Focus Asset Management and Tax Solutions Ltd, the respondent, wrongly advised them about their investments and should pay the statutory maximum under the Ombudsman's scheme of £100,000. When they issued the proceedings in the county court for damages for what they allege were the greater losses flowing from that faulty advice, the judge ordered the claim to be struck out. They appeal from that order.

Background

2. The appellants are in their mid to late sixties. The respondent gave them financial advice following the sale of a family business in 2001 and the sale of the business premises in 2004. They were advised to borrow and invest the amounts, together with the proceeds of the sales, in endowment policy plans. Trading in these policies was, on the appellants' case, disastrous. Their evidence is that their losses were in excess of £500,000.

3. In November 2008 the appellants complained to the Ombudsman by completing the relevant form. They asserted that the advice the respondent had given them had been inappropriate in the light of their risk profile. The written material the respondent gave them was inadequate and late. Given their losses they wanted to be placed in the position where they could clear the loans and have their capital returned.

4. The Ombudsman investigated. One of its adjudicators, Gregory Daubney, concluded that the complaint should be upheld. The appellants' imminent retirement and the size of the investment made the advice inappropriate to their circumstances. The respondent should pay compensation in accordance with a formula to place the claimants back in the position they would have been had the advice not been given. Mr Daubney wrote to the appellants: "[I]f the amount calculated in line with the formula detailed above produces a sum greater than £100,000 with interest then we cannot enforce a greater amount. However I would recommend that [the respondent] pays the full amount in full and final settlement of this complaint."

5. The respondent did not agree with Mr Daubney's decision but offered £100,000 in full and final settlement of the complaint. The appellants refused the offer and requested that the Ombudsman make a final decision. Thus Christopher Tilson, one of the ombudsmen, considered the matter. In a provisional decision in November 2009 he largely adopted the reasoning and conclusions of the adjudicator. The respondent had not properly portrayed to the appellants the real risk attached to its investment advice. Compensation of the appellants' loss should be in accordance, he said, with a formula which was designed to put them back where they would have been previously. The formula might produce a greater amount than the maximum he could award, namely £100,000 plus interest. In that event, he wrote, the appellants "may not be able to enforce a greater amount in the courts. A court would make its own decision of whether to award the recommended greater amount above £100,000. However, I would recommend that [the respondent] pays the full amount in full and final settlement of this

complaint". In accordance with the rules governing the Ombudsman the parties were given 28 days to make final submissions. Again the respondent offered £100,000 to the appellants; again they refused.

6. Thus on 12 January 2010 Mr Tilson issued his final decision. He upheld the complaint. Because no submissions had been made about the merits of his provisional decision, Mr Tilson's final decision was very much along the same lines. It contained the same sentences just quoted from the provisional decision, that the appellants might not be able to enforce a greater amount in the courts, but that he would recommend that the respondent pay the full amount. In a covering letter, Mr Tilson explained that the appellants had to decide within 28 days whether to accept or reject his conclusions. If the appellants accepted they "would be bound by the decision, which will be final".

7. The appellants' solicitor emailed Mr Tilson on 15 January 2010. He inquired about the meaning of 'final and binding' in relation to Mr Tilson's final decision. Specifically he asked: "Would the complainants' rights to pursue a civil claim through court proceedings for their additional loss (in negligence or otherwise) be prejudiced in any way by accepting the Final Decision and, if so, how?" The adjudicator, Mr Daubney, replied on 21 January 2010:

> "With regard to your request for clarification about the effect of accepting the ombudsman's decision.....if the business did not pay the recommended balance and [the appellants] decided to sue for the balance in court, the court would make its own decision on whether or not to award anything. As such, we cannot provide any further guidance on this matter because it would be for a court to make its own ruling, based on its own consideration of [the appellant's] claim, as to whether to enable enforcement of the recommended amount awarded by the Ombudsman."

8. On the 8 February 2010 the appellants completed a pro forma final decision acceptance/rejection form, indicating their acceptance of the decision by deleting the words "reject the decision". However, immediately after the surviving words, "our acceptance of the decision", they added a rider, in the first appellant's own handwriting, in capital letters: "WE RESERVE THE RIGHT TO PURSUE THE MATTER FURTHER THROUGH THE CIVIL COURT". The appellants each added their signatures to these words, separately from their signature of the form as a whole.

9. In a letter of response on 16 February, addressed to both parties, Mr Daubney stated that the appellants' acceptance letter meant that the final decision was now binding on all parties and the respondent needed to settle the complaint in accordance with its terms. On 19 March the respondent wrote to the appellants that, as per the final decision, which they had accepted, it was enclosing two cheques totalling £100,000. The letter added: "This now concludes the case and I will proceed to close my file." The evidence of the respondent's Mr Stewart was that he did not understand the rider to the acceptance to affect the position, believed that payment had to be made, and left matters largely to the insurers. The appellants confirmed to the respondent that the cheques had been received safely and paid them into their account.

10. In giving permission to appeal Irwin J suggested that the appellants apply to adduce additional evidence regarding their qualified acceptance of the Ombudsman's determination. The respondent took no objection. Their solicitor has completed a witness statement explaining how, on counsel's advice, he made a mistake of law in

advising them in early 2010 to accept the award in the manner they did. That was on the assumption that Andrews v SBJ Benefit Consultants Ltd [2010] EWHC 2875 (Ch); [2011] Bus LR 1608 (decided later that year) is good law.

The decision appealed

11. In June 2010 the appellants began the present action, claiming damages for losses resulting from the negligent actions of the respondent on or about 26 June 2004 and subsequently. The particulars of claim, several months later, asserted that the basis of the claim lay in breach of (1) contract, (2) fiduciary duty, (3) statutory duties and (4) the duty of care in tort. The particulars acknowledged the respondent's payment of £100,000, for which the appellants would give credit, asserting that the respondent had refused to pay the full amount calculable under the Ombudsman's formula or any additional amount.

12. In mid November 2011 the respondent applied for an order under CPR 11 striking out the appellants' claim on the footing that, because the Ombudsman's award had been accepted, the court had no jurisdiction to entertain the appellants' claim. The matter came before HH Judge Barratt QC in April 2011. He announced immediately after the hearing that he would grant the respondent's application. He added that he would put his reasons in writing once he had read the numerous authorities referred to by the parties.

13. In his reasons, handed down in October, the judge outlined the facts and the nature of the claim and identified, as the sole question for him, whether the appellants could accept the decision of the Ombudsman, receive the respondent's payment and then litigate to recover an additional sum by way of damages. The judge considered a number of authorities, including Andrews v SBJ Benefit Consultants Ltd [2010] EWHC 2875 (Ch); [2011] Bus LR 1608, and the appellants' submission that that decision could be distinguished. He concluded that the case was binding. The causes of action in the claim before him were precisely the same as considered by the Ombudsman. The doctrine of merger therefore applied. By accepting the Ombudsman's determination their cause of action merged into it so that the appellants were barred from litigating. The judge rejected the submission that in this case the behaviour of the Ombudsman, in particular Mr Daubney's letter of 21 January 2010, meant that it was not making a definite decision to trigger the operation of the merger doctrine.

14. The Ombudsman had made it clear, said the judge, that it would be for the court to decide the effect of the appellants' acceptance of its determination. The 21 January 2010 email could not be said to indicate the Ombudsman's view of the legal consequence of accepting the determination. There was no merit in the appellants' submission that the Ombudsman was mistaken about his powers. In any event, a challenge to that effect should be by way of judicial review. The judge continued that the rider which the appellants added in handwriting to their acceptance of the determination was of no effect. A contractual analysis, in particular the law of mistake, involving a tripartite relationship of the appellants, the Ombudsman and the respondent, was hopeless in the light of the statutory scheme. Moreover, the judge added, he was bound by Fraser v HLMAD Ltd [2006] EWCA Civ 738.

15. The judge then rejected in short order the appellants' submissions about contractual variation, cross estoppel by convention, common mistake, unilateral mistake and misrepresentation. The principles of restitution and mistake of law did not apply because:

> "106. In this case there is no money had and received by the [respondent] which it is required to repay. The money paid to the [appellants] was received by them because the [respondent] had no choice but to pay it; there was a statutory obligation enforceable as debt. There was no mistake of law about the obligation to pay and the [appellants] cashed the cheques. Had they not accepted the decision of the Ombudsman but instead chosen to pursue their claim in the civil court, the doctrine of merger would not have operated in law as it has in this case.
>
> 107. The principles of unilateral mistake of which error by the [appellants] it is submitted the [respondent] must be presumed to have been aware do not therefore apply. The [respondent] had no option but to pay up the award because the [appellants] had informed the Ombudsman that they agreed with and accepted his decision."

The statutory scheme

16. The key features for present purposes of the statutory scheme for the Financial Ombudsman Service established under Part XVI of the Financial Services and Markets Act 2000 ("the 2000 Act") are as follows. First, the statutory purpose is for a scheme "under which certain disputes may be resolved quickly and with minimum formality by an independent person": s.225 (1). Paragraph 14(1) of Schedule 17 of the Act empowers the Ombudsman to make rules ("scheme rules") "which are to set out the procedure for the reference of complaints and for their investigation, consideration and determination by an ombudsman". Among the rules set out in the Financial Services Authority's Handbook, Dispute Resolution: Complaints ("DISP"), 3.5.1R provides that the Ombudsman can resolve a complaint "by whatever means appear to him to be most appropriate, including mediation or investigation....." The procedure is designed to be swift and informal. For example, there is no disclosure of documents, and the Ombudsman can decide on how the evidence is to be received and when there will be an oral hearing (which is a rarity): 3.5.8R.

17. Secondly, under the Ombudsman's compulsory jurisdiction a complaint is to be determined "by reference to what is, in the opinion of the ombudsman, fair and reasonable in all the circumstances of the case": s.228 (2). Thus the Ombudsman need not apply the law to determine a complaint although he must take it and other matters into account in deciding what is the fair and reasonable disposal of a complaint. The Ombudsman may reach a decision contrary to the common law but needs to state that and provide an explanation. Illegality and irrationality on the part of the Ombudsman is subject to judicial review: R (on the application of Heather Moor & Edgecomb Ltd) v Financial Ombudsman Services [2008] EWCA Civ 642; [2008] BLR 1486, [49], [80].

18. Thirdly, after the Ombudsman has made a reasoned, written determination, and given it to the parties, complainants must notify it, within a given period, whether they accept or reject the determination: s.228(4)(c). Section 228(5) then provides: "If the complainant notifies the ombudsman that he accepts the determination, it is binding on the respondent and the complainant and final." If complainants do not notify the Ombudsman that they have accepted the determination, they are deemed to have rejected it: s.228 (6). Respondents must also be notified of "the outcome": section 228(7). A certified copy of the determination is evidence "that the determination was made under the scheme": ss.228 (8)-(9). The scheme is thus asymmetric since only a

complainant has the option to accept or reject the determination. If a complainant accepts a determination a respondent has no choice in the matter.

19. Fourthly, a determination under the Ombudsman's compulsory jurisdiction may include "a money award" against the respondent "of such amount as the ombudsman considers fair compensation for loss or damage …suffered by the complainant" (s. 229(2(a)), which will compensate for "(a) financial loss; or (b) any other loss, or any damage, of a specified kind": s. 229(3). A money award may bear interest: s. 229(8) (a). Importantly, section 229 provides:

> "(5) A money award may not exceed the monetary limit; but the ombudsman may, if he considers that fair compensation requires payment of a larger amount, recommend that the respondent pay the complainant the balance."

20. There is statutory power for maximum amounts to be specified "which may be regarded as fair compensation for a particular kind of loss or damage specified under subsection (3) (b)" (s. 229(3)), and as the monetary limit for awards (s. 229(6). The relevant rule, DISP 3.9.5R, specifies the maximum money award as £100,000. The Handbook also contains this guidance, issued pursuant to section 157 of the Act.

> "3.9.6 If the ombudsman considers that an amount more than the maximum is required as fair compensation then he may in addition recommend to the firm or licensee that it pays the balance."

21. Section 229(8)(b) provides that a money award is enforceable by the complainant in accordance with Part III of Schedule 17. Paragraph 16 of that schedule reads that a money award, including interest, registered in accordance with scheme rules, " may—(a) if a county court so orders in England and Wales, be recovered by execution issued from the county court (or otherwise) as if it were payable under an order of that court….".

22. Finally, Schedule 17 of the Act provides that scheme rules may provide that a complaint may, in specified circumstances, be dismissed without consideration of its merits: paragraph 14(2)(b). Paragraph 15(3) reads:

> "(3) The circumstances specified under sub-paragraph (2)(b) may include the following
>
> …
>
> (b) legal proceedings have been brought concerning the subject-matter of the complaint and the ombudsman considers that the complaint is best dealt with in those proceedings".

There is no right of appeal from the Ombudsman's decision on the merits.

The doctrine of merger

23. The judge regarded Andrews v SBJ Benefit Consultants Ltd [2010] EWHC 2875 (Ch); [2011] Bus LR 1608 as binding on him and consequently he held that the doctrine of merger applied. That doctrine means that a person who has obtained a final judgment in a tribunal of competent jurisdiction is precluded from later recovering in court a

second judgment for the same relief in respect of the same subject matter. The cause of action which the claimant first advanced merges with the judgment so that there is no cause of action to pursue on the second occasion. In Andrews the claimant accepted the Ombudsman's determination on his complaint for an award in his favour of £100,000. He then sued when the defendant refused to compensate him for his full loss in accordance with the Ombudsman's recommendation to that effect. Damages were claimed for breach of the statutory obligation to carry out the review of the claimant's case and to compensate him in accordance with the rules applicable to the review: [16]. Sitting as a High Court judge, HH Judge Pelling QC held that, as a result of his acceptance of the Ombudsman's award, the claimant was barred by the doctrine of merger from recovering anything in the courts.

24. In reaching this conclusion the judge held first, that in the claimant's case it was the same cause of action before the Ombudsman as was before the court. Although the claimant was advancing breach of statutory duty in the proceedings, damages were the essence of the claim and that was the juridical basis of what he had pursued before the Ombudsman: [30]-[34]. Secondly, as a matter of general principle a decision of the Ombudsman was to be treated as a court or tribunal for the purpose of the merger doctrine. The judge gave a number of reasons to support this: the Court of Appeal in R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Services [2008] EWCA Civ 642; [2008] Bus LR 1486 had proceeded on the basis that the Ombudsman was a court or tribunal to which the provisions of Article 6 of the European Convention on Human Rights and Article 1 of its First Protocol applied [36]; the Ombudsman's procedures satisfied the requirements of a court or tribunal, in particular because, unlike an administrative body, it afforded the parties the opportunity of adducing evidence and argument: [37]; and the informality of the Ombudsman's procedures did not mean it could be regarded as an administrative body, neither in the light of Heather Moor did its ability to decide matters other than in accordance with law: [38]. Thirdly, the judge rejected the argument that the non-binding character of an Ombudsman's determination meant that it could not be a judgment or award for the purpose of the merger doctrine: [39]. Fourthly, that non-binding character of a determination was not otherwise inconsistent with the application of the doctrine: [40]-[42]. Fifthly, application of the doctrine did not exclude complainants from access to the courts since they were not bound to accept a determination: [43]. Sixthly, the statutory scheme could not be construed as permitting a complainant to accept an award and still commence court proceedings [44]-[50]; and seventhly, there was no principle that the merger doctrine did not apply on grounds of unfairness: [51]-[82].

25. This sketch of the judge's reasons does not do justice to the care and cogency with which they are expressed. In my respectful view, however, there are weaknesses in the planks to the judge's conclusion. First, the judge set considerable store by the Court of Appeal decision in R (Heather Moor & Edgecomb Ltd) v Financial Ombudsman Service Ltd [2008] EWCA Civ 642; [2008] BLR 1486. Early in the judgment, at paragraphs [25]-[26], he quoted paragraph [49] of the lead judgment of Stanley Burnton LJ, who held that the 2000 Act meant that the Ombudsman was not obliged to determine a complaint in accordance with the common law. The judge also quoted paragraph [80] of Rix LJ's concurring judgment, that although the Ombudsman remained amenable through the ordinary process of judicial review, that was not the same as saying that he was bound to apply the common law in all its particulars. Significantly Rix LJ added: "He is, after all, dealing with complaints, and not legal causes of action, within a particular regulatory setting": [80]. Laws LJ agreed with both judgments. The judge said that the passages in Heather Moor were relevant to the

question whether the Ombudsman was to be regarded as a tribunal for the purpose of the merger doctrine: [77]. However, he did not address the relevance of Rix LJ's clear statement, that the Ombudsman deals with complaints, not causes of action. In my view that that obiter dictum cannot be brushed to one side. The doctrine of merger turns on a cause of action being extinguished – it is merged in the judgment. If the Ombudsman considers complaints, not causes of action, as Rix LJ said, the doctrine of merger has no purchase in this context.

26. Secondly, the judge's holding that the Ombudsman is a tribunal for the purposes of applying the principle of merger is, with the greatest respect, not persuasive. It will be recalled that the judge reached this conclusion because the Ombudsman fell on the judicial rather than administrative side of the functional divide. In my respectful view whether the doctrine of merger applies to the Ombudsman should be determined by a detailed analysis of its functions. Just because the complainant in Heather Moor conceded that the Ombudsman was to be treated as a tribunal under the European Convention on Human Rights (see [42]-[44]) does not mean that it is necessarily to be treated as a tribunal for the purposes of the doctrine of merger.

27. As I have explained, under the Ombudsman's compulsory jurisdiction it has the power under 3.5.1 R to try to resolve a case by means such as mediation. The typical tribunal does not itself engage in mediation. Similarly, when the Ombudsman makes a non-binding recommendation under section 229(5) of the 2000 Act that does not seem to me to be acting as a tribunal. Tribunals typically do not issue recommendations as to what the parties ought to do. Even if the Ombudsman does issue a determination, that is incapable of binding either the complainant or the respondent unless the complainant consents. In these circumstances it does not seem to me that the Ombudsman is engaged as a typical tribunal, albeit that it considers the merits of a complaint. One characterization might be that, even if it issues a determination, it has not been granted jurisdiction finally to decide the issue between the parties. Only if the complainant accepts the determination, after it is issued, does it become binding. In a way it is a type of ex post facto conferral of jurisdiction. Finally, there is important point Rix LJ made in Heather Moor, that the Ombudsman deals with complaints, not causes of action. Thus for a number of reasons the functions of the Ombudsman differ from those of the typical tribunal. Certainly the Ombudsman is far removed in its functions from the magistrates' court considered in Wright v London General Omnibus Authority (1877) 2 QBD 271, and the employment tribunal in Fraser v HLMAD [2006] EWCA Civ 738; [2007] 1 All ER 383, authorities considered below, where the doctrine of merger was held to apply.

28. Thirdly, I am not convinced by the judge's approach to statutory construction. He held that to permit court proceedings after the acceptance of an award by the Ombudsman would mean that the Ombudsman's determination had not resolved the dispute. Resolution of disputes was the aim of the Ombudsman scheme, and therefore the 2000 Act should be construed as intending that the Ombudsman's decision disposes of a matter and further proceedings are not permissible. The judge also suggested that allowing a claimant to sue in the courts for the excess above the £100,000 cap in the courts would deprive the scheme of any purpose. Mr Howarth for the respondent added that section 228(5) provides that, on acceptance, an award is binding and final. The word "binding" shows that the award gives an enforceable legal right. "Final" could not mean an end to the Ombudsman's process because that process had been exhausted by the making and acceptance of an award (subject only to judicial review): therefore if

"final" had any meaning it must indicate that the complainant could not take further proceedings.

29. In my view the correct approach is to consider the Ombudsman scheme as a whole. The statutory aims, as outlined earlier, are to provide a scheme for the summary and informal resolution of disputes. As was confirmed in Heather Moor the Ombudsman need not apply the law in reaching a fair and reasonable disposal of a complaint. The Ombudsman's procedure is designed to be expeditious. Complainants may accept or reject the Ombudsman's determination, but if they take the former course the award is binding on the parties and final. It is widely accepted that the scheme has been remarkably successful in resolving the complaints of clients against those offering financial services. If the Ombudsman's award, even though accepted, does not lead to the end of proceedings in any one case, that would not undermine the statutory aims. The scheme would still yield a final outcome in cases where there was no prospect of the complainant receiving more than £100,000 in compensation. There would be no point in a complainant contemplating legal action in that situation. With amounts beyond that the Ombudsman's non-binding recommendation for the respondent to under section 229(5) might well encourage the parties to compromise without recourse to the courts. It seems to me that for a complainant to use an award of £100,000 to finance the legal costs of bringing court proceedings for a greater amount is not inconsistent with the statutory aims. As to Mr Howarth's point, in my view the term "final" simply means the end of the Ombudsman's process. Overall, the statutory scheme in the 2000 Act is, in my view, neutral as to how the issue arising in Andrews, and indeed this case, is to be resolved.

30. In my respectful view the judge in Andrews was wrong to regard the doctrine of merger as applying to the determinations of the Ombudsman. The judge below should not have regarded that decision as determinative of the outcome of the appellants' claim. Because he considered Andrews as binding, he considered a number of other arguments the appellants advanced. Since the issues were freely canvassed before me it seems sensible to express my conclusions about them. Thus what follows proceeds on the basis that Andrews was decided correctly and that the Ombudsman deals with causes of action and is a tribunal so that the doctrine of merger operates.

The Ombudsman's mistake and the appellants' acceptance

31. On the appellants' behalf Mr Wolman contended that the judge below was wrong in rejecting his submission that the Ombudsman was mistaken in what the appellants were told. A critical mistake was said to be in Mr Daubney's 21 January 2010 email, that if they accepted the determination, and if the respondent did not pay the recommended amount beyond the £100,000, a court would decide whether to award that amount. The appellants had accepted the Ombudsman's determination as a result of that mistaken representation as to the position. The respondent was also mistaken. Thus in Mr Wolman's submission the appellants' acceptance was vitiated on principles analogous to those operating in the law of contract. The payment to them of £100,000 was not in full and final settlement of their complaint as provided for in section 228(5) of the 2000 Act. The doctrine of merger could not apply.

32. In my view the 26 January 2010 email cannot bear the construction which Mr Wolman places on it. The judge was correct in ruling that there was no mistake or misrepresentation on the Ombudsman's part. As the judge noted, the email explained that it would be for the courts to decide the effect of the appellants' acceptance. That was an accurate statement of the position at the time. The 26 January 2010 email

predated by nine months the decision in Andrews v SBJ Benefit Consultants Ltd [2010] EWHC 2875 (Ch); [2011] Bus LR 1608. Nor were there the ambiguities which Mr Wolman sought to tease out of other of the Ombudsman's statements. In the light of Mr Stewart's evidence for the respondent, I cannot see how it can be said that the respondent was also mistaken; he was very much leaving matters to the insurer.

33. In any event I agree with the judge below that contractual notions of offer and acceptance and common mistake have no application in a scheme which lays down a statutory procedure for the acceptance of the Ombudsman's determination. That the appellant's acceptance was somehow mistaken does not preclude the doctrine of merger operating. In Wright v London General Omnibus Authority (1877) 2 QBD 271, the plaintiff was injured in a traffic accident. The responsible bus drivers were prosecuted before the magistrate who had jurisdiction to award compensation summarily of up to £10. The magistrate convicted the drivers and said that he proposed to award the plaintiff compensation of £10. The plaintiff said that the sum was insufficient, but accepted the money. It was held that he could not sue for the balance of his alleged damages after accepting the £10. Cockburn CJ said that by taking the £10 the plaintiff consented to the exercise of jurisdiction and was bound by it:

> "I am afraid that the plaintiff was misled, and thought that he was not prejudicing his right to recover further compensation against the company … [T]he plaintiff's ignorance of the law cannot enter into consideration in determining the legal result of his consenting to the award of compensation": at 275.

Mellor J agreed and said that the plaintiff seemed to have availed himself of it in ignorance of the legal effect of what he was doing. However, he concluded, the matter became res judicata and could not be reopened: at 276.

34. The appellants point to the rider they added to the acceptance, in which they reserved the right to pursue the matter further, through the civil courts. That, it was submitted, meant that the judge should have held that there was not a genuine acceptance of the Ombudsman's determination. It was tantamount to a rejection of its terms or a counter-offer. It revealed the appellants' intention to accept only a set of terms which, when correctly understood, were inconsistent with the terms of the determination. But again authority is against the appellants. In Fraser v HMLAD [2006] EWCA Civ 738; [2007] 1 All ER 383 the claimant had a claim for wrongful dismissal. Both the employment tribunal and the court had jurisdiction to determine that claim, although the tribunal was not able to award a sum in excess of £25,000. The claimant commenced proceedings in the tribunal for unfair dismissal and wrongful dismissal but in the form initiating the proceedings reserved his right to sue in court for wrongful dismissal for a sum in excess of £25,000. The tribunal awarded amounts for both unfair dismissal and wrongful dismissal. The claimant could have withdrawn the wrongful dismissal part of the claim, and proceeded with the unfair dismissal aspect only, but did not do so: [29], [49]. In the subsequent High Court proceedings to recover a sum in excess of the tribunal threshold for wrongful dismissal the defendant successfully applied to strike out the claim on the ground that the cause of action had merged into the tribunal award. The Court of Appeal held that there was no cause of action left for the claimant to prosecute. The purported reservation of rights in the form was ineffective in preventing merger: [29], [50] and [55]. It was not relevant that the outcome might be described as unfair: [30], [50], [60].

35. Thus in my view the judge was right to hold that the appellants accepted the Ombudsman's determination. Despite the rider to their acceptance, I cannot see how the determination had not been finally accepted. Not only did the appellants accept the determination but they received and banked the respondent's cheque. Indeed they advanced this claim on the basis they were entitled to the £100,000 and to additional damages. As I understand it no re-payment of the £100,000 has been made.

36. Mr Wolman sought to avoid this conclusion by contending that the causes of action ruled on by the Ombudsman are not the same as those advanced in these proceedings. In particular the Ombudsman did not address the issue of breach of fiduciary duty as a result of the commissions the respondent obtained for the advice it gave the appellants. In my view the additional matters set out in the pleadings are further particulars of the causes of action already pursued before the Ombudsman. As Diplock LJ put it in Letang v Cooper [1965] 1 QB 232, 244, there can be different descriptions of the same cause of action. In this case the facts giving rise to the claim for breach of fiduciary duty include those agitated before the Ombudsman, albeit that the points about commission payable to the respondent were not mentioned. On the assumption that Andrews v SBJ Benefits Consultants Ltd is correctly decided, the judge was correct in concluding that the doctrine of merger applied.

The appellants' mistake and unjust enrichment

37. By reference to passages in Goff & Jones on Unjust Enrichment (C Mitchell, P Mitchell, S Watterson eds), 8th ed, 2011, paras 1-13, 1-14, 9-01, Mr Wolman submitted that if Andrews v SBJ Benefits Consultants Ltd was correct, the appellants mistakenly conferred a benefit on the respondent, namely, the abandonment of their right to sue it for compensation in excess of £100,000. The respondent had gained a benefit at the appellants' expense, which it would be unjust to permit it retain. That was as a consequence of the appellants' mistake of law, which arose from a reliance on the Ombudsman's advice. Thus the judge below had been wrong to confine claims in restitution to the narrow confines he did.

38. For the respondent, Mr Howarth contended that the judge had been correct in rejecting the proposition that mistake was somehow relevant. The additional evidence from the appellants revealed that their lawyers appreciated the risk that the point which the respondent successfully took before the judge would be raised. The lawyers wrongly advised that the respondent's point was a bad one or that it was possible to protect the appellants' position by reserving a right to sue. Thus the appellants did not make a mistake in the sense in which the term is used in the law of restitution. Rather, the appellants and their lawyers were aware of the risk but chose to run it. They did not act under a mistake. Instead, they had made a mistaken judgment as to the outcome of an issue of which they were aware.

39. Mr Howarth invoked Dextra Bank and Trust Co Ltd v Bank of Jamaica, [2002] 1 All ER (Comm) 193, where the Judicial Committee of the Privy Council considered Dextra's argument that the money it paid to the bank was paid under a mistake in that Dextra had intended to make a loan. In giving the opinion of the Board, Lords Bingham and Robert Goff said that the difficulty with this proposition was that the mistake did not appear to have been a mistake as to a specific fact, as for example a mistake as to the identity of the defendant, but rather a misprediction as to the nature of the transaction which would come into existence when the Dextra cheque was delivered to the bank, a very different matter. The Board referred to Introduction to the Law of Restitution, pp.147-8, where Professor Birks explained the rationale of this distinction:

> "The reason is that restitution for mistake rests on the fact that the plaintiff's judgment was vitiated in the matter of the transfer of wealth to the defendant. A mistake as to the future, a misprediction, does not show that the plaintiff's judgment was vitiated, only that as things turned out it was incorrectly exercised. A prediction is an exercise of judgment. To act on the basis of a prediction is to accept the risk of disappointment. If you then complain of having been mistaken you are merely asking to be relieved of a risk knowingly run…"

40. As to the appellants' contention that they conferred a benefit on the respondent, Mr Howarth submitted that that was an impossibly constrained interpretation. It was the appellants who received the benefit of the Ombudsman's determination; they did not give a benefit to the respondents. The respondent had no choice but had been compelled by law to make the payment once the appellants chose to accept the determination. The respondent did receive the appellants' acceptance with the rider, but given the limited time it had to respond it could not inquire into its effect. Moreover, a claim in unjust enrichment was inconsistent with the statutory scheme.

41. In my view, if Andrews v SBJ Benefits Consultants Ltd in the law and merger has occurred, the respondent was enriched at the appellants' expense. Its potential liability for damages to them has been replaced by a liability to pay only the £100,000 determined by the Ombudsman. The appellants suffered a loss obviously related to the respondent's gain so that it can be said there was the requisite transfer of value between the parties to ground a claim in unjust enrichment.

42. Moreover, it seems to me that the transfer of value by the appellants was caused by a mistake of law on their part. The appellants' decision to accept the Ombudsman's determination, with the rider added, was based on legal advice. Their lawyers had doubts about whether the appellants might still be able to sue in court if the determination was accepted. That the appellants and their lawyers had doubts as to the legal position is not inconsistent with their making a mistake. In Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners [2006] UKHL 49; [2007] 1 AC 558, Lord Hoffmann said:

> "[27] … I would not regard the fact that the person making the payment had doubts about his liability as conclusive of the question of whether he took the risk, particularly if the existence of these doubts was unknown to the receiving party. It would be strange if a party whose lawyer had raised a doubt on the question but who decided nevertheless that he had better pay should be in a worse position than a party who had no doubts because he had never taken any advice, particularly if the receiving party had no idea that there was any difference in the circumstances in which the two payments had been made. It would be more rational if the question of whether a party should be treated as having taken the risk depended upon the objective circumstances surrounding the payment as they could reasonably have been known to both parties, including of course the extent to which the law was known to be in doubt."

It must be recalled that at the point the appellants accepted the determination in early February 2010, the decision in Andrews v SBJ Benefit Consultants Ltd [2010] EWHC

2875 (Ch) [2011] Bus LR 1608 was still 9 months away. In the light of that decision, however, the appellants were mistaken about the law. In all the circumstances known to the parties in early February 2010 it cannot be said that the appellants took the risk of accepting the Ombudsman's determination. Rather, they were in doubt as to the legal ramifications, as evidenced by the addition of the rider. Consequently they acted because of a mistake on their part.

43. But if the appellants made a mistake of law in accepting the Ombudsman's determination they face the difficulty that the respondent on whom the benefit was conferred had nothing to do with it. I have already held that there was no error on the Ombudsman's part at the point it advised, in the 21 January 2010 email, that if the appellants accepted its final decision the court would give its own consideration to their claim for the outstanding amount. However, the evidence is that the appellants' acceptance was induced, at least in part, by the Ombudsman's email. So the Ombudsman's statement was causative of the appellants' mistake. Yet the same cannot be said of what the respondent did. There is nothing in the evidence to suggest that the appellants were in any way influenced by the respondent in accepting the Ombudsman's determination. Nor can the Ombudsman be regarded as in any way the respondent's agent so that what it did can be attributed to the respondent.

44. Without the appellants' mistake having been induced in some way by the respondent it is difficult in my view to conceive of how the appellants can ground a restitutionary claim against it. They cannot explain why they should obtain a remedy for the benefit conferred on the respondent pursuant to their acceptance of the Ombudsman's determination, even if (which in my view is the position) the statutory scheme is neutral on the matter. Further, there are difficulties associated with the nature of the remedy the appellants would obtain were they successful in their unjust enrichment claim. It cannot be that the appellants would be able to obtain from the respondent the recovery which they might otherwise obtain in damages for breaches of contractual, fiduciary, statutory or tortious duties. At most their remedy would be to escape their acceptance of the Ombudsman's determination and then be entitled to enforce what they allege are their rights against the respondent. Yet the obstacle to this is that, on the assumption that Andrews v SBJ Benefit Consultants Ltd is correct, merger has occurred and their causes of action are no more. The appellants would face a heavy burden of establishing that they should be able to reverse that process, given the fundamental change in their rights which merger would have wrought.

Conclusion

45. For the reasons I have given the doctrine of merger does not apply to determinations of the Ombudsman, which have been accepted. Nor does the statutory scheme preclude those like the appellants in this case from claiming damages from a financial services provider for an amount in excess of the Ombudsman's determination, which they have accepted.